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263 NLRB No. 114

D--9075
Woodbridge, VA

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

DALE SERVICE CORP.

and

Case 5--CA--14158

UNITED FOOD & COMMERCIAL WORKERS UNION, LOCAL 400, AFL--CIO

DECISION AND ORDER

Upon a charge filed on March 12, 1982, by United Food & Commercial Workers Union, Local 400, AFL--CIO, herein called the Union, and duly served on Dale Service Corp., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 5, issued a complaint and notice of hearing, on April 19, 1982, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on January 29, 1982, following a Board

election in Case 5--RC--11694, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate; and that, commencing on or about March 3, 1982, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On May 6, 1982, Respondent filed its amended answer to its answer of April 26, 1982, admitting in part, and denying in part, the allegations in the complaint.

On May 26, 1982, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on June 10, 1982, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed on June 18, 1982, its memorandum in opposition to the General Counsel's Motion for Summary Judgment.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer and amended answer to the complaint Respondent admits that it has refused to bargain with the Union, but it

contends that the Union's certification was improper because, in the underlying Decision and Direction of Election by the Acting Regional Director for Region 5, four employees, allegedly the force behind the Union's organizational drive, were erroneously found to be nonsupervisory by the Acting Regional Director and included in the unit, thereby tainting the showing of interest, rendering the unit inappropiate for collective-bargaining purposes, and relieving Respondent of its duty to bargain with the certified representative. Respondent contends, therefore, that the General Counsel's Motion for Summary Judgment should be denied, the Acting Regional Director's certification should be set aside, and the Union's petition should be dismissed.

The General Counsel in its Motion for Summary Judgment noted that Respondent has failed to present any evidence or to raise any issue in addition to those offered and considered in the representation proceedings, other than to assert that Respondent is without knowledge as to the accuracy of the Regional Director's allegations in paragraph 3 of the complaint dealing with the status as a labor organization of the Union, within the meaning of Section 2(5) of the Act.[1]

The record further shows that subsequent to the Decision and Direction of Election by the Acting Regional Director on December 17, 1981, Respondent on December 30, 1981, filed with the Board a request for review and a motion for reconsideration, and that the

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[1] The record in the underlying representation proceeding, Case 5--RC--11694, shows that Respondent stipulated that United Food & Commercial Workers Union, Local 400, AFL--CIO, was a labor organization within the meaning of the Act, as amended.

Board on January 20, 1982, denied the request for review on the ground that the motion raised no substantial issues warranting review.

The record finally shows that, in the representation election held on January 21, 1982, the tally of ballots shows that of approximately 11 eligible voters, 11 cast valid ballots for the Union, there were no ballots against, and no challenged ballots. No objections to the election were filed by either party.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[2]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

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[2] See Pittsburgh Plate Glass Co. v. N.L.R.B., 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of Respondent

Dale Service Corp., a Virginia corporation with an office and place of business in Woodbridge, Virginia, is engaged in the sewage treatment business. Annually Respondent purchases and receives at its Woodbridge, Virginia, facility goods, products, and materials valued in excess of $50,000 from other enterprises located within the State of Virginia, each of which other enterprises has received said goods, products, and materials directly from points outside the State of Virginia.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

The parties stipulated in the underlying representation proceeding in Case 5--RC--11694 and we find that United Food & Commercial Workers Union, Local 400, AFL--CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. The Representation Proceeding

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full time and regularly scheduled part-time employees, including senior operators, employed by the Employer at its Woodbridge, Virginia facility, excluding office clericals, guards and supervisors as defined in the Act.

2. The certification

On January 21, 1982, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 5, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on January 29, 1982, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. The Request To Bargain and Respondent's Refusal

Commencing on or about February 11, 1982, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about March 3, 1982, and continuing at all times thereafter to date, Respondent has refused, and continues to

refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since March 3, 1982, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent, set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the

initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See Mar-Jac Poultry Company, Inc., 136 NLRB 785 (1962); Commerce Company d/b/a Lamar Hotel, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; Burnett Construction Company, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Dale Service Corp. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Food & Commercial Workers Union, Local 400, AFL--CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full time and regularly scheduled part-time employees, including senior operators, employed by the Employer at its Woodbridge, Virginia facility, excluding office clericals, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since January 29, 1982, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about March 3, 1982, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Dale Service Corp., Woodbridge, Virginia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with United Food & Commercial Workers Union, Local 400, AFL--CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

All full time and regularly scheduled part-time employees, including senior operators, employed by the Employer at its Woodbridge, Virginia facility, excluding office clericals, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Woodbridge, Virginia, facility copies of the attached notice marked ''Appendix.''[3] Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily

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[3] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading ''POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD'' shall read ''POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.''

> All full time and regularly scheduled part-time employees, including senior operators, employed by the Employer at its Woodbridge, Virginia facility, excluding office clericals, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Woodbridge, Virginia, facility copies of the attached notice marked ''Appendix.''[3] Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily

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[3] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading ''POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD'' shall read ''POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.''

posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. August 31, 1982

Howard Jenkins, Jr., Member

Don A. Zimmerman, Member

Robert P. Hunter, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with United Food & Commercial Workers Union, Local 400, AFL--CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All full time and regularly scheduled part-time employees, including senior operators, employed by the Employer at its Woodbridge, Virginia facility, excluding office clericals, guards and supervisors as defined in the Act.

DALE SERVICE CORP.

(Employer)

Dated ---------- By ----------
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Edward A. Garmatz Federal Building, 101 W. Lombard Street, Ninth Floor, Baltimore, Maryland 21201, Telephone 301--962--2772.